

## THE SUPREME COURT OF THE UNITED STATES. (a)

**B**UT few words remain to be added to those so well spoken by my distinguished brethren, in concluding, on the part of the Bar, the expression which this occasion calls for.

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In its origin the Federal Court was an experiment, untried and uncertain. Judicial history has not furnished another example of a Court created by an authority superior to legislation and beyond the reach of executive power, clothed with a jurisdiction above the law it was appointed to administer, and charged not merely with the general course of public justice, but with the limitation of the powers of political government, and the adjustment of the conflicting claims of sovereign states. The hundred years that now terminate have tested the value of all American institutions. Fortunate as they have been for the most part, it will yet be the judgment of dispassionate history that no other has so completely justified the faith of its authors, or fulfilled with such signal success the purpose of its foundation.

What was that purpose? Not the limited original jurisdiction of the Court, dignified and important, but rarely invoked. Not chiefly even, its ordinary appellate jurisdiction, extensive and beneficent as it is, most desirable, yet,

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(a) [This article is in substance—omitting a few passages of purely local interest—the address delivered by Mr. Phelps on behalf of the Bar of the United States, on the occasion of the Centennial Anniversary of the foundation of the Supreme Federal Court. The author has been good enough to send it to this Review for publication.—*Ed. Jurid. Rev.*]

perhaps, not indispensable. Not for these objects, great though they are, was it placed, nor did it need to be placed, on the singular eminence it occupies. Its principal and largest function was designed to be, as it has been, the defence and preservation of the Constitution that created it, as the permanent fundamental law on which our system of government depends.

Had that instrument been left only directory to the legislature, to be construed and given effect to as the exigencies of party or the purposes of the hour might demand; had it been referred to the conflicting determination of various Courts, with no supreme arbiter to correct their mistakes, or to harmonise their disagreements, so that its meaning might depend upon the State or the tribunal in which the question happened to arise, it would speedily have become but the shadow of an authority that had no real existence, fruitful in a discord it was powerless to allay. American experience has made it an axiom in political science, that no written constitution of government can hope to stand, without a paramount and independent tribunal to determine its construction and to enforce its precepts in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States.

The jurisdiction of the Court over questions of this sort, and the dual sovereignty so skilfully divided between the States and the Federation, as they are the most striking, are likewise the only entirely original features in the Constitution. All else found a precedent, or, at least, a prototype in previous institutions. In its other branches it is mainly the combination and adaptation of machinery that was known before. It was to be expected, therefore, that the earliest and most critical exercise of the new power conferred upon the Court would be displayed in dealing with the new form of sovereignty at the same time devised, and bringing into harmony those opposite forces that might so easily have resulted in conflict and

disaster. The questions that have arisen in this field have been usually the most delicate, often the most difficult, always the most conspicuous of all that have engaged the attention of the Court. While it has been charged with the limitation of many other departments of governmental authority, here have been found hitherto its most prominent employment and the most dangerous emergencies it has had to confront. Here have taken place its most celebrated judgments, the most signal triumphs of its wisdom, its foresight, as well as its moral courage—rarest of human virtues. It is to this sagacious judicial administration of the Constitution that we are principally indebted for the harmonious operation that has attended the Federal system, each party to it made supreme in its own sphere, and at the same time strictly confined within it, neither transgressing nor transgressed. Looking back now upon this long series of determinations, it is easy to see how different American history might have been, had they proved less salutary, less wise, and less firm. The Court did not make the Constitution, but has saved it from destruction. Only in one great conflict, generated by the single inherent weakness of the Constitution, and unhappily beyond judicial reach, has the Court failed to maintain inviolate all the borders and marches of contiguous jurisdiction, and to keep unbroken the peace of the Union.

But it still remains to be observed, that the service of preserving through the Constitution the Union of the States, great and distinguished as it is, and vital as it is, has been wrought upon the machinery of government, not upon its essence. Beyond and above the question how a political system shall be maintained, lies the far larger question, why should it be maintained at all? The forms of free government are valuable only as they effect its purpose. They may defend liberty, but they do not constitute it nor necessarily produce it. Their ultimate permanence, therefore, among the men of our race must depend not on themselves but on their results.

The true analysis of the function of the Supreme Court as

the conservator of the Constitution, involves consequently the further inquiry, What is the value of the Constitution to those who dwell under the shadow of its protection ?

It rests upon the foundation-stone of popular sovereignty. The true definition of that familiar and much abused phrase is not always kept in view. The sovereignty of the people is not the arbitrary power or blind caprice of the multitude, any more than of an aristocracy or a despot. It is not the right of any class, small or great, high or low, to wrong or oppress another. It is not a struggle between classes at all. It is simply the recognition of the natural and equal rights of man as the basis of a government formed for their protection by its people, and regulated by law. A system under which every citizen, in the peace of God and of the State, shall be assured by indefeasible right and not by favour or sufferance, in the enjoyment of his life, his liberty, his property in all its forms, his home, his family relations, his freedom of conscience and of speech. The powers of government, in all their extent and elaboration, come down at last to this ultimate purpose. For this they exist, and on this foundation is raised all that renders social life desirable. "In my mind," says Lord Brougham, "he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy into no metaphor, who once said that all we see about us, King, Lords, and Commons, the whole machinery of the State, all the apparatus of the system and its varied workings, end in simply bringing twelve good men into a box."

The world has seen empires and dynasties without number, based upon arbitrary power. But for the most part it has seen them perish. They have illuminated the page of history, but with the light of the comet and the meteor, not of the stars. The civilisation they have brought forth has been as transient as themselves. Neither government nor civilisation contained any element of permanence, until they came to be founded upon the principles of civil and religious liberty. Magna Charta was therefore the starting-point not merely of free institutions, but of the only civilisation that

ever did or ever could survive political systems, and pass on unimpaired from the ruins of one to the construction of another. Its striking and memorable language no rhetoric has been able to improve, no casuistry to obscure. When it broke upon the world it proclaimed a new era; the dawning of a better day for humanity, in which the rights of man became superior to government, and their protection the condition of allegiance. The great thought matured with a slow but certain growth. Battles enough were fought for it, but never in vain. Until at last it came to be established for ever upon English soil, and among the English race on every soil. And the highest eulogy upon the British Constitution was spoken when Chatham said: "The poorest man may in his cottage bid defiance to all the force of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter; but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." But the great orator could go no further; he could not say that the British Parliament might not enter the home of the subject, for all the judges of England are powerless in the face of an Act of Parliament, whatever it may be. It was reserved for the American Constitution to extend the judicial protection of personal rights, not only against the rulers of the people, but against the representatives of the people.

The history of the Saxon race exhibits few changes more striking than the succession of power. First, in the king; then, when royal supremacy became intolerable, in the hands of the barons, who struck the earliest blow for freedom, and long stood between the throne and the people, the supporters of one, the protectors of the other. When in the course of time that oligarchy had in its turn abused its authority, it passed to the Parliament chosen by the people. And when at last the founders of our Constitution, driven to revolution by a parliamentary oppression, had learned that even representative government cannot always be depended upon by those it represents, they placed the protection of personal

rights beyond the reach of the popular will, and found in a constitutional judiciary the true and final custodian of the liberty of the subject.

The maintenance of these rights against all Federal interference was conferred upon the Court by amendment almost immediately after the adoption of the Constitution, and as soon as it was perceived that the power ought to be expressed, because it might fail to be implied. The protection of them against State invasion in one important particular—the inviolability of contracts—was provided in the original Constitution. And when, twenty-two years ago, the interference of the States with the rights of life, liberty, and property was forbidden by the Fourteenth Amendment, the jurisdiction of the Court over this great subject became complete, and will, beyond doubt, always remain so. But one exception still exists, in the power of Congress, within the limited scope of its authority, to pass a law, though it may impair the obligation of a pre-existing contract.

Other topics of constitutional interpretation will always remain. The time will never come when questions of conflicting authority between the States and the Nation will cease to arise. But that field must gradually grow smaller, and its inquiries less critical. The main landmarks have now been planted, the boundary lines traced, the cardinal rules strongly and clearly established. Future labour in that direction, though constant, will be easier and plainer than in the century that has passed away.

But new attacks upon individual rights, in many forms and under many pretexts, are beginning to be heard of, and are to be looked for in an increasing measure. The accursed warfare of classes is the danger that appears chiefly to threaten the future. It requires little prescience to perceive that the burden of constitutional administration by the Court is to shift hereafter in a considerable degree from the preservation of the machinery of government to the enforcement of its ultimate object; from conflicts between the States and the Federation, to those between the State and the citizen,

involving the protection of property, of contracts, of personal rights. But the best assurance that the Court will be found equal to the emergencies that are to come, whatever they may prove to be, is seen in the success with which it has encountered those of the past. And that success is most clearly shown by the public confidence it has inspired. The people of this country have learned to have faith in the Court and pride in it. Elevated and in a measure isolated as it is, they still feel it to be their own. Many a plain man may never have seen it, nor ever expect to see it. He cannot discriminate its jurisdiction, nor understand its procedure. The principles of its jurisprudence are not for his comprehension. But he reposes with a more confident security under the roof his industry has raised, and enjoys with a better assurance the liberty that has made him free, because he knows there is a limit which oppression cannot transgress; that he can never be disseized nor outlawed, nor otherwise destroyed; that no agency of power can go upon him or send upon him, but by the judgment of his peers and the law of the land; and he believes that if the worst should come to the worst, and wrong and outrage should be found intolerable, and yet without other redress, there is still laid up for him a remedy under the constitution of his country, to be compassed in some way or other, in the Supreme Court of the United States.

Long and late may it be before that confidence is shaken. If it is sometimes childlike in its simplicity, it is always noble in its origin. Long and late may it be before even the suggestion shall penetrate the faith of common men, that the highest American justice is not for them. May no consideration of convenience, no pressure of business ever find its relief in any limitation, which shall carry the idea to the body of the people that there is reserved in this country for the powerful corporation, the millionaire, and the great financier an ultimate justice that the humbler citizen cannot reach; that a ruinous cause may be decided against him without redress; and yet the same judgment in the case of

another man, whose dealings are larger in amount, though smaller in relative consequence, may be reversed and set aside as unlawful and unjust. Lawyers know that purely constitutional questions are not measured by figures. But that discrimination between the special and the general jurisdiction can neither be made nor understood by the mass of men. And such questions form but a small part of the administration of justice. Public confidence is a sensitive plant. No institution in a free government can afford to endanger it.

And thus, by the inexorable logic of sound constitutional principles, it has been brought to pass that the rights of the people find their last and best security, not in the popular assembly, nor in any agency of its creation, but in that institution of government which is farthest of all beyond the popular reach, which is made, as far as any institution can be, independent of public feeling, and invulnerable to the attack of majorities. Having its origin in the sovereignty of the people, it is the bulwark of the people against their own unadvised action, their own uninstructed will. It saves them, not merely from their enemies, it saves them from themselves. And so it perpetuates the sovereignty from which it sprang; and which has best provided for its own supremacy by the surrender of a power it was dangerous to retain. For this purpose alone, apart from those necessary to its own maintenance, does the National Government cross the line of the States. All merely legal rights of the citizen, outside of Federal affairs, are left dependent upon the authority of the State in which he is found. Only the cardinal personal rights are taken in charge by the Nation, as between the Government and the individual, because only through that protection can be assured either the value or the permanence of a Constitution, which is itself the Government, and itself the Union.

The experience of American free government has shown that it is the tendency of its legislative branches to decrease, and of its judicial power to rise in public estimation. It has

added a fresh demonstration to the truth that is as old as the history of freedom, that it must find its safety where it found its origin, in the exertions of those to whom truth is better than popularity, and right superior to gain. It has proved again what has been proved so often; that the only liberty that humanity can tolerate is the liberty that is under the law.

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Judges will be appointed and will pass away. But whoever comes and whoever goes, the Court remains. The king may die, but still the king survives. Strong in its traditions, consecrated by its memories, fortified with the steadfast support of the profession that surrounds it, anchored in the abiding trust of its countrymen, the great Court will go on—and still go on, keeping alive through many another century that has yet to come, the light that burns with a constant radiance upon the high altar of American constitutional justice.

EDWARD J. PHELPS.